U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E- & Y- U- LLP

DATE: MAY 2, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an entity that provides infrastructure and support services to another partnership, seeks to permanently employ the Beneficiary in the United States as a tax manager - - systems. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigration classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1152(b)(2). This "EB-2" classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center found that the Beneficiary's degree was not, as required, a U.S. degree in the field specified on the labor certification.

On appeal, the Petitioner asserts that the Director denied the petition in error because he did not consider evidence showing that the Beneficiary has a foreign degree that is equivalent to a U.S. bachelor's degree in the field specified on the labor certification.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration is generally a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

[1] The date the labor certification is filed, in cases such as this one, is called the "priority date."

II. ANALYSIS

The issue is whether the Beneficiary's degree meets the minimum educational requirements of the proffered position, as required by the labor certification. A petitioner must establish that a beneficiary meets all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The Petitioner stated on the labor certification at Section H that the offered job requires candidates to possess a U.S. bachelor's degree in computer science, engineering, business, finance, or a related field; or alternatively a U.S. master's degree. The Petitioner also stated on the labor certification that no foreign educational equivalent was acceptable.

The Beneficiary has a bachelor of technology degree in mechanical engineering from the [redacted] in [redacted] India. The Petitioner's evidence includes the Beneficiary's diploma, transcripts, an academic equivalency evaluation from [redacted] and printouts from the [redacted] all of which establish that his degree is foreign degree equivalent to a U.S. bachelor's degree. However, the issue is not whether the Beneficiary's Indian degree is the equivalent of a U.S. bachelor's degree in computer science, engineering, business, finance, or a related field, as specified on the labor certification. Rather, because the Petitioner stated on the labor certification that no foreign educational equivalent is acceptable for the proffered position, the Beneficiary's foreign degree does not establish that he meets the minimum educational requirements for the proffered position.

On appeal, the Petitioner acknowledges that it stated on Section H of the labor certification that no foreign educational equivalent is acceptable for the proffered position, but contends that the plain language of the labor certification at sections J and K, the academic equivalency evaluation, and the fact that it has already hired the Beneficiary into the position indicate that it in fact accepts foreign educational qualifications for the position. However, Section J (Alien Information) and Section K (Alien Work Experience) relate solely to the Beneficiary's own qualifications and work experience, apart from the requirements of the proffered position. Similarly, the evaluation from [redacted] discusses the Beneficiary's academic qualifications and concludes that he has a foreign degree equivalent to a U.S. bachelor's degree. However, the fact that the Beneficiary has a foreign degree that is equivalent to a U.S. bachelor's degree and is already working for the Petitioner does not consequently demonstrate that the labor certification allows a foreign degree in lieu of a U.S. degree. *See, e.g., SnapNames.com, Inc. v. Chertoff*, No. CV 06-65-MO, 2006 WL 3491005, *7 (D. Or. Nov. 30, 2006) (finding that even though an employer may prepare a labor certification with a beneficiary in mind, USCIS has an independent role in determining whether the beneficiary meets the labor certification requirements). As discussed, the labor certification at Section H reflects that no foreign educational equivalent degree is acceptable for the proffered position. Had the Petitioner

intended to accept a foreign equivalent degree in lieu of a U.S. degree, it could have recorded such intent on the labor certification, but did not.

On appeal, the Petitioner also cites to a District Court decision and contends that the denial has resulted in a violation of the notions of fundamental fairness and due process because DOL, not USCIS, is tasked with determining the job requirements. *Singh v. Attorney Gen.*, 510 F.Supp. 351 (D.D.C. 1980, *aff'd* 672 F.2d 894 (D.C. Cir. 1981). During labor certification proceedings, the DOL may review a beneficiary's qualifications for an offered position. *See, e.g.*, 20 C.F.R. § 656.17(i)(3) (barring a foreign national, as of his or her hiring by a labor certification employer, from having less training or experience than is required of U.S. applicants). USCIS, however, has the ultimate authority to determine a beneficiary's qualifications for a DOL-certified position and for the requested immigration classification. *See* section 204(b) of the Act, 8 U.S.C. § 1154(b) (authorizing USCIS to approve a petition after determining that "the facts stated in the petition are true" and that a foreign national qualifies for the requested preference classification). Moreover, "DOL may gauge an alien's skill level in evaluating the effect of the alien's employment on United States workers," but that "does not foreclose [the immigration service] from considering alien qualifications in the preference classification decision." *Madany v. Smith*, 696 F.2d 1008, 1012 (D.C. Cir. 1983). The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

> [T]he Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984). In its role to determine whether a beneficiary is qualified for the certified job offer, USCIS must examine the certified job offer exactly as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). Our interpretation of the job's requirements must involve reading and applying the plain language of the alien employment certification application form. *Id.* at 834. In this case, a reading of Section H reflects that the Petitioner stated that no foreign degree was acceptable for the proffered position

The Petitioner also states that a DOL Board of Alien Labor Certification Appeals (BALCA) case is applicable in this matter. Citing to *Matter of Healthamerica*, 2006-PER-1 (BALCA July 18, 2006), the Petitioner states that by approving the labor certification application, "DOL exercised its authority to certify the application containing a non-material error." However, DOL precedent is not binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS

are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Moreover, the BALCA panel in *Healthamerica* allowed reconsideration of a labor certification that contained a typographical error about the claimed date of job advertisement (*i.e.*, March 6 was mistakenly entered as March 7);[2] the error did not materially change the requirements of the offered position. However, in the case before us now, the Petitioner has not demonstrated that its statement that "no" foreign equivalent degree was acceptable for the proffered position was the result of a similar minor keystroke error or that the error is immaterial to the requirements for the offered position. Further, although we are not bound by BALCA precedent, we may take note of the reasoning and findings in applicable cases. Here, a more analogous case is *Matter of Sushi Shogun*, 2011-PER-02677 (BALCA May 28, 2013). In that case, the panel found that the promulgation of 20 C.F.R § 656.11(b), prohibiting any modification to labor certifications filed after July 16, 2007, precluded the employer from making changes to the offered position on the labor certification. Like the filing in *Sushi Shogun*, the labor certification in this case was filed after July 16, 2007, and is similarly barred from modification or amendment. Moreover, as the DOL made clear in the preamble to the *Proposed Rule, Reducing Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity, Permanent Labor Certification Program*, 71 Fed. Reg. 7655 (Feb. 13, 2006), "[u]nder proposed 656.11(b), DOL clarifies that requests for modification to an application submitted under the current regulation will not be accepted . . . . Nothing in the streamlined regulation contemplates allowing or permits employers to make changes to applications after filing." The preamble goes on to highlight that:

> The online application system is designed to allow users to proofread and revise before submitting the application, and the Department expects and assumes that users will do so. Moreover, in signing the application the employer declares under penalty of perjury that he or she has read the application and the submitted information is true and accurate to the best of his or her knowledge. In the event of an inadvertent error or any other need to refile, an employer can withdraw an application, make the corrections and file again immediately . . . . In addition, the entire application is a set of attestations and freely allowing changes undermines the integrity of the labor certification process because changing one answer on an application could impact analysis of the application as a whole.

Id.

Here, the attempt to change the answer from "no" to "yes" for question H.9 materially changes the requirements of the offered position and impacts the analysis of the labor certification as a whole.

---

[2] *Healthamerica* was decided prior to the final notice of rulemaking which promulgated 20 C.F.R. § 656.11(b) prohibiting modifications to the labor certification form.

The Petitioner also asserts on appeal that by certifying the labor certification, DOL "has confirmed that no US workers were unlawfully disqualified from consideration for the offered position due to possessing a foreign bachelor's degree equivalent." Certification of the offered position by the DOL indicates that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers. Certification does not indicate that the Petitioner's recruitment was reviewed and found proper; only in the case of an audit or other specific request does DOL review and evaluate the Petitioner's recruitment results. In this case, there is no evidence in the record that DOL audited the labor certification or otherwise reviewed the Petitioner's recruitment results.[3]

For the reasons discussed above, we find that the labor certification requires a U.S. bachelor's degree or alternatively, a U.S. master's degree. The Petitioner has not established that the Beneficiary has such a degree.

III. CONCLUSION

The Petitioner has not submitted sufficient evidence to establish that the Beneficiary possesses the minimum education for the proffered position in the form of a U.S. degree, as required on the labor certification. Accordingly, the Petitioner has not established the Beneficiary's eligibility for the immigration benefit sought.

ORDER: The appeal is dismissed.

Cite as *Matter of E- & Y- U- LLP*, ID# 1176083 (AAO May 2, 2018)

[3] *See* U.S. Department of Labor, Employment and Training Administration, Office of Foreign labor Certification "Permanent Labor Certification Details - Process for Filing" https://www.foreignlaborcert.doleta.gov/perm_detail.cfm (last visited May 1, 2018).